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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 1387

BEN BECKHAM, JR.,

Petitioner,

—against—

ASHTON J. MOUTON, COLLECTOR OF REVENUE OF THE STATE OF LOUISIANA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL, SECOND CIRCUIT, STATE OF LOUISIANA, OR, IN THE ALTERNATIVE, TO THE SUPREME COURT OF LOUISIANA

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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1968

BEN BECKHAM, JR., Petitioner, --against-- ASHTON J. MOUTON, COLLECTOR OF REVENUE OF THE STATE OF LOUISIANA, Respondent	NO. _____

Petitioner respectfully prays that a writ of certiorari issue to review the judgment of the Court of Appeal, Second Circuit, State of Louisiana, which was entered in this action on October 30, 1967, or, in the alternative, to review the order and judgment of the Supreme Court of Louisiana entered February 5, 1968, by which that Court refused to issue writ of certiorari or review.

CITATIONS TO OPINIONS BELOW

The unreported judgment of the First Judicial District Court, Caddo Parish, Louisiana, rendered July 6, 1965, sustaining petitioner's exception of prescription and dismissing plaintiff's suit, is printed in Appendix B, page 11 a.

The opinion of the Supreme Court transferring to the Louisiana Court of Appeal, Second Circuit, the appeal erroneously taken by respondent, is printed in Appendix B, pages 11a-13a.

The opinion and decree of the Louisiana Court of Appeal, Second Circuit, affirming the judgment of the District Court sustaining petitioner's plea of prescription and dismissing respondent's suit, is printed in Appendix B, pages 14a-18a.

The opinion and decree of the Supreme Court of Louisiana, annulling and reversing the judgments of the District Court and of the Court of Appeal, overruling petitioner's exception of prescription and remanding the case to the District Court for further proceedings, is printed in Appendix B, pages 18a-27a.

The unreported judgment of the First Judicial District Court, Caddo Parish, Louisiana, in favor of respondent and dismissing petitioner's plea of unconstitutionality, is printed in Appendix B, pages 27a-28a.

The opinion and decree of the Louisiana Court of Appeal, Second Circuit, affirming the judgment of the First District Court, Caddo Parish, Louisiana, is printed in Appendix B, pages 28a-32a.

The decree of the Supreme Court refusing petitioner's application for certiorari or writ of review to the Louisiana Court of Appeal, Second Circuit, rendered February 5, 1968, is printed in Appendix B, pages 32a-33a.

JURISDICTION

The judgment of the Court of Appeal, Second Circuit, State of Louisiana, was entered on October 30, 1967, and application for rehearing was denied on November 28, 1967 (Appendix B, pages 28a-32a.)

Petitioner's application to the Supreme Court of the State of Louisiana for a writ of certiorari or review was denied on February 5, 1968 (Appendix B, pages 32a-33a).

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257 (3).

QUESTIONS PRESENTED

(1) Whether respondent or the Board of Tax Appeals, which are agencies in the Executive Department of the State government of Louisiana, may exercise judicial functions and equate an assessment of state income taxes to a judgment in favor of the State against which the prescription of three years established by the Constitution barring collection of taxes, does not apply.

(2) Whether a state legislature may by statute, or a state court by decree, render inoperative the prescription of three years imposed upon the state against collection of taxes by Article XIX, Section 19 of the Constitution of the State of Louisiana.

(3) Whether Louisiana Revised Statutes, Title 47, Section 1580, "Interruption and Suspension of Prescription," and Section 1581,

Respondent filed summary proceedings as authorized by Louisiana Revised Statute 47:1574, alleging as sole basis to collect the tax that respondent "holds a final judgment of the Board of Tax Appeals of the State of Louisiana" against petitioner. The document described by respondent as "a final judgment" is simply a decision dated February 28, 1950, by the Board of Tax Appeals, which states:

"IT IS ORDERED AND DECIDED that there is a deficiency in the amount of $5,513.01 in income tax due and owing by Ben Beckham, Jr., for the calendar year 1945, together with interest thereon at the rate of six (6%) per cent per annum from May 15, 1946, until paid."

Petitioner appeared in the District Court and filed an exception of prescription, on the ground that "the action is based solely on a 'decision' of the Board of Tax Appeals for the State of Louisiana dated February 28, 1950, more than fifteen years prior to institution of suit for collection of said taxes, and said income taxes for year 1945 are, therefore, prescribed by Article 19, Section 19, of the Louisiana Constitution of 1921, as amended by Act 35 of 1938, adopted November 8, 1938, which provides that 'all taxes and licenses, other than real property taxes, shall prescribe in three years from the 31st day of December in the year in which such taxes or licenses are due.'"

Petitioner also filed a Plea of Unconstitutionality of Act 299 of 1942 (R.S. 47:1401) et seq., in which he asserted that the Board of Tax Appeals is an independent agency in the Executive Department of the State Government; that it is without constitutional power or

authority to render a "final judgment" against him, since that function is vested exclusively in the Courts of Louisiana, and "that in event plaintiff relies on said statute creating the Board of Tax Appeals as interrupting prescription, that said statute and the so-called final judgment of the Board of Tax Appeals contravenes the Constitution of Louisiana, and particularly Article 7 thereof, and said statute as applies to appearer is, therefore, unconstitutional and without effect."

Petitioner also filed an answer to Respondent's Rule for Taxes and to the petition of the bank for authority to deposit into the Registry of Court a sum sufficient to cover all amounts claimed by respondent and to be dismissed, denied any liability to respondent, and reiterated his Exception of Prescription and Plea of Unconstitutionality.

The District Judge sustained petitioner's Plea of Prescription, dismissed respondent's suit and ordered the Clerk of Court to pay to petitioner the sum of $11,869.77 deposited into the Registry of Court.

Respondent appealed the judgment of the District Court to the Supreme Court, which transferred the appeal to the Court of Appeal, Second Circuit (248 La. 571, 180 So. 2d 708). The Court of Appeal affirmed the District Court's judgment sustaining the Plea of Prescription (186 So. 2d 652). Writ was granted by the Supreme Court, and after hearing, that Court annulled and reversed the judgments of the District Court and of the Court of Appeal sustaining petitioner's Exception of Prescription, and remanded the case to the District

Court for further proceedings (196 So. 2d 270).

Upon remand to the District Court, petitioner filed an Amended Plea of Unconstitutionality, asserting that R.S. 47:1580 and R.S. 47:1581 are unconstitutional in providing that prescription established by Article 19, Section 19 of the State Constitution can be interrupted by an assessment of a tax by the Collector of Revenue or by a decision of the Board of Tax Appeals. Basically, petitioner contended that neither the Collector of Revenue nor the Board of Tax Appeals, which were created by the legislature as a part of the Executive Department, can constitutionally render a "judgment", which is solely a judicial function.

The District Court dismissed petitioner's Amended Plea of Unconstitutionality, and rendered judgment in favor of respondent for the sum of $10,762.87, plus legal interest from judicial demand, and ordered the Clerk to pay said sum out of the funds deposited into the registry of court. The Court of Appeal affirmed, citing the Supreme Court's opinion, which equates an "assessment" to a "judgment", against which prescription does not accrue, but stating, significantly:

"It is the contention of the appellant, and technically the contention is correct, that the Supreme Court did not declare the above statutes constitutional in its previous decision and that this Court must, therefore, pass upon their constitutionality."

In his petition for rehearing, filed November 10, 1967, in the Court of Appeal, petitioner assigned, among other errors:

2.

The Court is in error in holding that the Supreme Court did or could properly decree before issue was presented that an "assessment" by an Executive agency of the State government could constitutionally convert a claim by the State for unpaid income taxes to a judgment in favor of the State and thereby render ineffective the prescription against collection by the State of taxes as provided in Article 19, Section 19, of the State Constitution. The sole constitutional issue before the Supreme Court was the State's assertion that prescription was inapplicable because the State held "a decision by the Board of Tax Appeals." The State did not assert by pleading that an assessment, which is purely an administrative act of the Executive Department, had the effect of a judgment in favor of the State. The decree, therefore, goes beyond the issues presented and denies to petitioner the equal protection of laws and deprives him of property without due process of law, all in contravention of the Fourteenth Amendment to the Federal Constitution.

3.

Article 19, Section 19, of the Louisiana Constitution providing that all taxes and licenses other than real property taxes prescribe in three years from the 31st day of December in the year in which such taxes or licenses are due, was adopted by the people as an amendment to the Constitution of the State of Louisiana, which Constitution establishes the functions to be

performed by the three departments of government, judicial, legislative and executive, none of which can be performed by either of the other, and any statute, particularly LSA-R.S. 47:1401, et seq., and LSA-R.S. 47:1581, which purport to authorize the Department of Revenue and the Board of Tax Appeals, both being agencies of the Executive Department, to exercise judicial functions and in effect decree that an "assessment" or a "decision" of the Board of Tax Appeals is a "judgment" contravenes Article 4, Section 4, of the Federal Constitution, providing that the United States shall guarantee to every State in this Union a Republican form of Government. To permit the Executive Department to render judgments which would become inprescriptible would destroy the constitutional power and authority of the courts and would vest in the Executive Department dictatorial and arbitrary powers contrary to the State Constitution. Article 19, Section 19, of the State Constitution is a limitation imposed by the citizens of the State upon the right of the Executive Department to collect income taxes where action, as here, was not taken by the State for over fifteen years.

Petitioner's application to the Supreme Court of Louisiana for writ to review the final decision of the Court of Appeal was refused. Neither the Court of Appeal nor the Supreme Court of Louisiana decided the federal constitutional questions as presented.

REASONS FOR GRANTING THE WRIT

1. The Constitution of the State of Louisiana divides the powers of the government

into three distinct departments - legislative, executive and judicial. No one of these departments may exercise power properly belonging to either of the others, except in instances expressly permitted. La. Const. Art. II, §§ 1 and 2.

The judicial power of the State is vested by the Constitution in a Supreme Court, in Courts of Appeal, in District Courts and in other courts therein provided. La. Const. Art. VII, § 1.

Articles II and VII of the Louisiana Constitution were adopted in 1921. Article XIX, Sec. 19, of the Louisiana Constitution was amended by Act 35 of 1938, and adopted by the people November 8, 1938, to provide "* * * that all taxes and licenses, other than real property taxes, shall prescribe in three years from the 31st day of December in the year in which such taxes or licenses are due."

The Board of Tax Appeals and the Collector of Revenue of Louisiana were created by the legislature as agencies in the Executive Department of the State government. The decision below equates an assessment of taxes by the Collector of Revenue and a decision by the Board of Tax Appeals to a judgment. Such decision and the legislative statutes (R.S. 47:1580 and 47:1581) on which it is based contravene the Louisiana Constitution and deny to petitioner the equal protection of law.

2. The Constitution of Louisiana provides a Republican form of government. The separation of powers into legislative, executive and judicial are clearly defined. The decision below

fails to recognize and give effect to the separation of powers of the State government as provided in its Constitution, contrary to Article IV, Sec. 4, of the United States Constitution.

3. R.S. 47:1580 provides that prescription running against any state tax shall be interrupted by an assessment of taxes by respondent. The statute also provides that such prescription may be suspended not to exceed three years by means of a written agreement between the taxpayer and respondent made prior to the elapse of the prescriptive period, as set forth in the State Constitution.

The decision of the court below fails to recognize the distinction between an interruption and a suspension of the running of prescription.

Prescription is interrupted by judicial demand, and such interruption works suspension during pendency of suit. LSA-R.S. 9:5801. Wilson v. King, 145 So. 2d 128.

Where there is mere interruption of prescription, running of same prescription commences again at termination of interruption. LSA-C.C. Art. 3534, 3538, 3544. Hotard v. Fleitas, Inc., 67 So. 2d. 345.

Also, see Miller v. American Mutual Liability Insurance Company, et al., 42 So. 2d. 328; Paul Klopstock & Co., Inc., v. United Fruit Co., 171 La. 296, 131 So. 25; Federal Insurance Co. v. T. L. James & Co., La. App., 69 So. 2d 636; Albert A. Wilson v. Carleton King, 145 So. 2d. 128; Borne v. La Terre Co., C.A. 1955, 22 F. 2d 453.

The action here was brought by respondent some fifteen years after the prescription against collection of taxes by the State had been interrupted. Article 19, Section 19 of the Louisiana Constitution does not provide for either an interruption or a suspension. The prescription had accrued some five times at the time respondent seized petitioner's bank account. Unless the Governor of Louisiana or his agent, respondent, can by assessment convert a tax claim to the dignity of a judgment in favor of the State, the taxes for which this action was brought had prescribed.

4. Petitioner suggests that his petition presents substantial constitutional questions as yet undecided.

CONCLUSION

For each of the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be granted and the judgment below reversed.

Respectfully submitted,

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Constitutional Provisions and Statutes Involved

U.S. CONSTITUTION, AMENDMENT XIV, § 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONSTITUTION, ARTICLE IV, § 4

The United States shall guarantee to every State in this Union a Republican Form of Government, * * *

LOUISIANA CONSTITUTION, ARTICLE II, §§ 1 & 2

§ 1. Departments of government

Section 1. The powers of the government of the State of Louisiana shall be divided into three distinct departments -- legislative, executive, and judicial.

§ 2. Separation of departmental powers

Section 2. No one of these departments, nor any person or collection of persons holding office in one of them, shall exercise power properly belonging to either of the others, except in the instances hereinafter expressly directed or permitted.

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LOUISIANA CONSTITUTION, ARTICLE VII, § 1

§ 1. Judicial power; judges conservators of peace; style of process; reasons for judgment; appeals.

Section 1. The judicial power shall be vested in a Supreme Court, in Courts of Appeal, in District Courts, and in such other courts as are hereinafter provided.

* * *

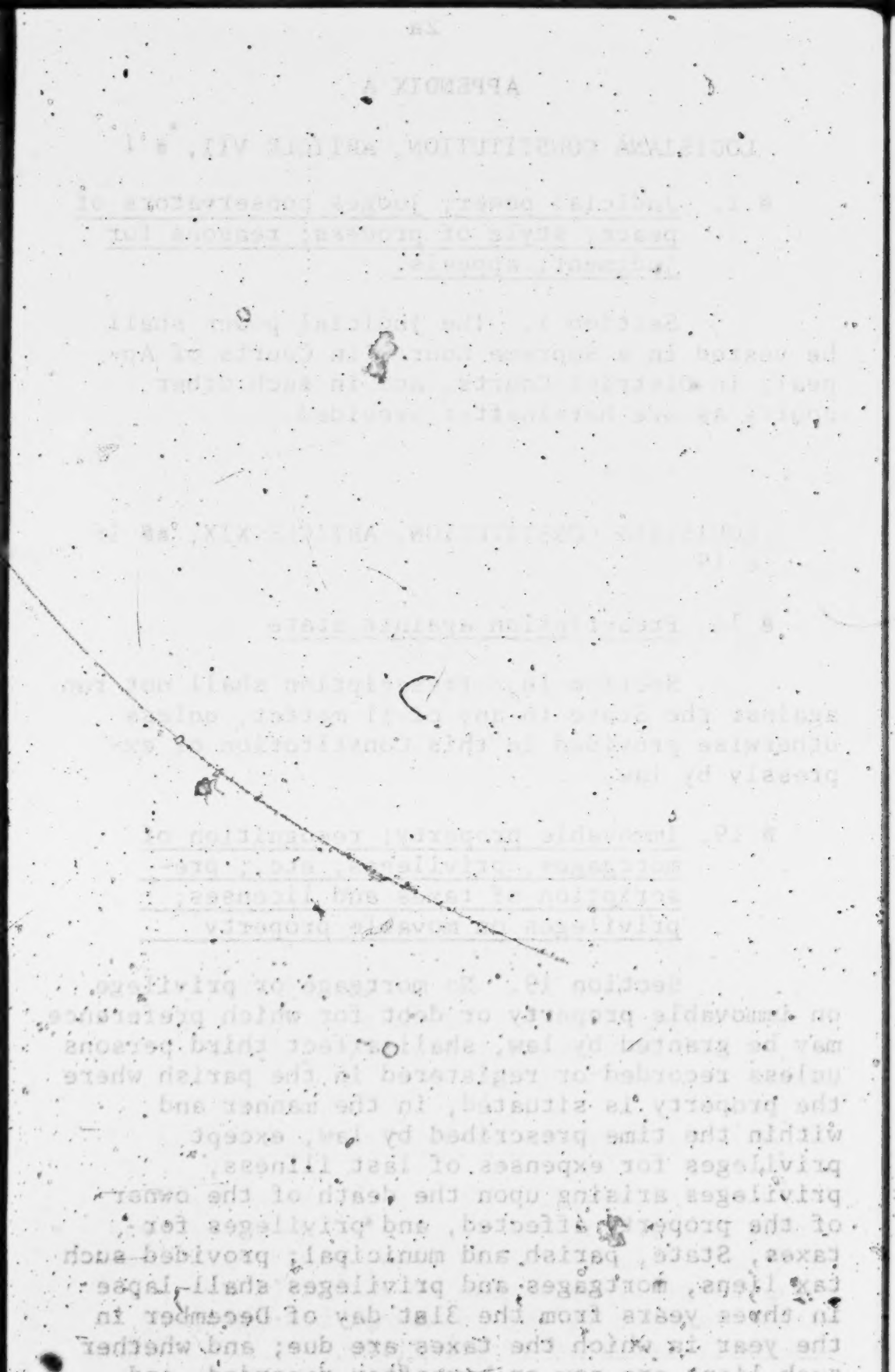
LOUISIANA CONSTITUTION, ARTICLE XIX, §§ 16 & 19

§ 16. Prescription against state

Section 16. Prescription shall not run against the State in any civil matter, unless otherwise provided in this Constitution or expressly by law.

§ 19. Immovable property; recognition of mortgages, privileges, etc.; prescription of taxes and licenses; privileges on movable property

Section 19. No mortgage or privilege on immovable property or debt for which preference may be granted by law, shall affect third persons unless recorded or registered in the parish where the property is situated, in the manner and within the time prescribed by law, except privileges for expenses of last illness, privileges arising upon the death of the owner of the property affected, and privileges for taxes, State, parish and municipal; provided such tax liens, mortgages and privileges shall lapse in three years from the 31st day of December in the year in which the taxes are due; and whether such liens are now or hereafter recorded; and



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provided, further, that all taxes and licenses, other than real property taxes, shall prescribe in three years from the 31st day of December in the year in which such taxes or licenses are due.

Privileges on movable property shall exist without registration of same, except in such cases as may be prescribed by law. (As amended Acts 1938, No. 35, adopted Nov. 8, 1938).

LOUISIANA REVISED STATUTES, TITLE 47

§ 1401. Creation of board of tax appeals

In order to provide a board that will act as an appeal board to hear and decide, at a minimum of expense to the taxpayer, questions of law and fact arising from disputes or controversies between a taxpayer and the collector of revenue of the State of Louisiana in the enforcement of any tax, excise, license, permit or any other tax law administered by the collector, the Board of Tax Appeals, hereinafter referred to as the board, is created as an independent agency in the executive department of the state government, and for the purposes of this Chapter.

§ 1402. Membership of board; qualifications; appointment; term; vacancy; salary

The board shall be composed of three members, who shall be qualified electors of the state. The members shall be appointed by the Governor, and shall serve at his pleasure.

Successors to the members of the board when this section takes effect shall be appointed by the Governor. Each member shall serve until his successor is appointed and qualified. When-

board, it shall be filled by appointment of the Governor as quickly as practicable.

The Governor shall fix the salary of each member, which shall be payable monthly or semi-monthly on the warrant of the chairman. As amended Acts 1950, No. 58 § 1.

§ 1561. Alternative remedies for the collection of taxes

In addition to following any of the special remedies provided in the various Chapters of this Sub-title, the collector may, within his discretion, proceed to enforce the collection of any taxes due under this Sub-title, by means of any of the following alternative remedies or procedures:

(1) Assessment and distraint, as provided in R.S. 47:1562 through 47:1573.

(2) Summary court proceeding, as provided in R.S. 47:1574.

(3) Ordinary suit under the provisions of the general laws regulating actions for the enforcement of obligations.

The collector may choose which of these procedures he will pursue in each case, and the counter-remedies and delays to which the taxpayer will be entitled will be only those which are not inconsistent with the proceeding initiated by the collector; provided that in every case the taxpayer shall be entitled to proceed under R.S. 47:1576 except after he has filed a petition with the board of tax appeals for a redetermination of the assessment, and except when there is pending against him a suit

involving the same tax obligation; and provided further, that the fact that the collector has instituted proceedings under the assessment and distraint procedure will not preclude him from thereafter proceeding by summary or ordinary court proceedings for the enforcement of the same tax obligation.

§ 1562. Determination and notice of tax due

If a taxpayer fails to make and file any return or report required by the provisions of this Sub-title, or if the return or report made and filed does not correctly compute the liability of said taxpayer, the collector shall cause an audit, investigation or examination to be made to determine the tax, penalty and interest due, or he shall determine the tax, penalty or interest due by estimate or otherwise. Having determined the amount of tax, penalty and interest due, the collector shall send by mail a notice to the taxpayer at the address given in the last report filed by him pursuant to the provisions of the Chapter governing the tax involved, or if no report has been filed, to any address that may be obtainable, setting out his determination and informing the person of his purpose to assess the amount so determined against him after thirty calendar days from the date of the notice.

§ 1569. Collection by distraint and sale authorized

When any taxpayer fails to pay any tax, penalty and interest assessed, as provided in this Sub-Title, the collector may proceed to enforce the collection thereof by distraint and sale.

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§ 1570. Distraint defined

The words "distraint" or "distrain" as used in this Sub-title, shall be construed to mean the right to levy upon and seize and sell, or the levying upon or seizing and selling, of any property or rights to property of the taxpayer including goods, chattels, effects, stocks, securities, bank accounts, evidences of debt, wages, real estate and other forms of property, by the collector or his authorized assistants, for the purpose of satisfying any assessment of tax, penalty or interest due under the provisions of this Sub-title.

Property exempt from seizure by Articles 644 and 645 of the Louisiana Code of Practice is exempt from distraint and sale herein.

§ 1571. Distraint procedure

Whenever the collector or his authorized assistants shall distrain any property of a taxpayer, he shall cause to be made a list of the property or effects distrained, a copy of which, signed by the collector or his authorized assistants shall be sent by registered mail to the taxpayer at his last known residence or business address, or served on the taxpayer in person. This list shall be accompanied with a note of the sum demanded and a notice of the time and place where the property will be sold. Thereafter, the collector shall cause a notice to be published in the official journal of the parish wherein the distraint is made, specifying the property distrained, and the time and place of sale. The sale shall be held not less than fifteen calendar days from the date of the notice mailed or served on the taxpayer or the date of publication in the official journal, whichever is later. The col-

if he deems it advisable, but not for a time to exceed thirty calendar days in all. If the sale is continued to a new date it shall be re-advertised.

§ 1579. Prescription of taxes, interest, and penalties

There shall be no prescription running against any state tax, license, excise, interest, penalty or other charge levied under this Subtitle, except that ordained in the Constitution of Louisiana.

§ 1580. Interruption and suspension of prescription

The prescription running against any state tax, license, excise, interest, penalty or other charge shall be interrupted by:

(1) The collector's action in assessing any such amounts in the manner provided by law;

(2) The filing of a summary proceeding in court;

(3) The filing of any pleadings, either by the collector or by a taxpayer, with the board of tax appeals or any state or federal court; and

(4) The filing of a false or fraudulent return.

The running of such prescription may also be suspended for a time not to exceed three years, by means of a written agreement between the taxpayer and the collector made prior to the elapse of the prescriptive period set out in the Consti-

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§ 1581. Prescription of assessments as judgments

Any tax, penalty, interest, or other charges duly assessed under this Sub-title, being the equivalent of a judgment, shall not be subject to the running of any prescription other than such prescription as would run against a judgment in favor of the State of Louisiana in accordance with the Constitution and laws of this state; and the recordation of such assessment shall have the same effect as the recordation of a judgment.

LOUISIANA CODE OF CIVIL PROCEDURE, ARTICLE 421

Civil action; commencement, amicable demand unnecessary

A civil action is a demand for the enforcement of a legal right. It is commenced by the filing of a pleading presenting the demand to a court of competent jurisdiction. Amicable demand is not a condition precedent to a civil action, unless specifically required by law.

LOUISIANA CODE OF CIVIL PROCEDURE, ARTICLE 859

Same; judgment or decision

In pleading a judgment of a domestic or foreign court, or a decision of a judicial or quasi judicial tribunal, or of a board, commission, or officer, it is sufficient to allege the judgment or decision without setting forth matter showing jurisdiction to render it.

LOUISIANA CODE OF CIVIL PROCEDURE, ARTICLE 1841

Judgments, interlocutory and final

A judgment is the determination of the rights of the parties in an action and may award any relief to which the parties are entitled. It may be interlocutory or final.

A judgment that does not determine the merits but only preliminary matters in the course of the action is an interlocutory judgment.

A judgment that determines the merits in whole or in part is a final judgment.

LOUISIANA CODE OF CIVIL PROCEDURE, ARTICLE 1911

Final judgments read and signed in open court

Except as otherwise provided by law, all final judgments shall be read and signed by the judge in open court.

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Opinions, Judgments and Decrees Below

(a) Judgment of the First Judicial District Court, Caddo Parish, Louisiana, sustaining petitioner's exception of prescription and dismissing plaintiff's suit.

COLLECTOR OF REVENUE,
Plaintiff,

VS.

PIONEER BANK & TRUST COMPANY, et al.,
Defendants

NO. 169,401

FIRST DISTRICT COURT

CADDO PARISH, LOUISIANA

The rule to show cause taken out by Pioneer Bank & Trust Company on June 18, 1965, came on this day to be tried. Present, G.M. Bodenheimer, Jr., representing Pioneer Bank & Trust Company, Emmett E. Batson, representing Collector of Revenue, State of Louisiana, and J.C. Smith, representing Ben Beckham, Jr.

The Court having heard the pleadings and evidence and the argument of counsel, and considering the law and the evidence to be in favor thereof, for reasons orally assigned,

IT IS ORDERED, ADJUDGED AND DECREED that the Exception of Prescription of Ben Beckham, Jr., defendant, be and the same hereby is sustained and plaintiff's suit dismissed.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that said rule be recalled and that the Clerk of

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Court pay to Ben Beckham, Jr., the sum of Eleven Thousand Eight Hundred Sixty-nine and 77/100 ($11,869.77) Dollars deposited into the registry of this Court by Pioneer Bank & Trust Company June 18, 1965.

JUDGMENT RENDERED July 6, 1965.

JUDGMENT READ ALOUD, SIGNED AND FILED in open court, July 7, 1965.

/s/ John A. Dixon, Jr.
District Judge

(b) Opinion of Supreme Court of Louisiana rendered December 13, 1965, transferring to the Court of Appeal, Second Circuit, State of Louisiana, the appeal erroneously taken by respondent to the Supreme Court of Louisiana, reported in 248 La. 571, 180 So. 2d 708 (1965).

McCALEB, Justice.

This is a summary proceeding instituted by the Collector of Revenue for enforcement of a deficiency assessment against Ben Beckham, Jr., appellee herein, for additional state income taxes for the year 1945 aggregating, with principal and interest, the sum of $10,762.87. The litigation originated against Pioneer Bank & Trust Company, Shreveport, Louisiana, which had on deposit to the tax-debtor's credit a sum exceeding the amount of the taxes and interest claimed by the Collector. This deposit was distrained by the Collector pursuant to R.S. 47:1569, 47:1570 and 47:1571.

In due course the bank appeared and alleged, inter alia, that Beckham had been notified by it of the levy on and distraint of his deposit

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and that it, being without interest in the funds in contest, desired to place the same in the Registry of the Court and be discharged from the proceeding. The judge issued an order in conformity with the prayer of the answer and the bank was accordingly dismissed from the case. Thereafter, Beckham appeared and filed special pleadings, viz., an exception of the three-year prescription provided by Article 19, Section 19 of the State Constitution; an alternative plea of unconstitutionality of all State statutes relied on by the Collector as a basis for interrupting or suspending the running of the constitutional prescription; and an answer reiterating, in substance, the plea of prescription and the alternative plea of unconstitutionality.

Following a hearing on a rule nisi, the exception of prescription was maintained. The judge accordingly dismissed the proceeding and ordered the Clerk of Court to pay Beckham the sum deposited in the Registry of the Court. The Collector has appealed from the adverse decision.

At the outset we notice, sua sponte, our lack of appellate jurisdiction of the case. Under the revision of appeal by amendment to Sections 10 and 29 of Article 7 of the Constitution provided for by Act 561 of 1958, adopted on November 4, 1958, the direct appellate jurisdiction of this Court has been limited to five classes of cases.

(1) The first class (under which the Collector asserts jurisdiction here) extends to:

"1. Cases in which the constitutionality or legality of any tax, local improvement assessment, toll or impost levied by the state or by any parish, municipality, board or

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subdivision of the state is contested."

The case at bar does not involve the constitutionality or the legality of the income taxes the Collector seeks to recover herein. Beckham is not contesting the validity of the State income tax law; his main and only defense is that the claim of the Collector is prescribed.

Nor does Beckham's alternative plea bring the case within the above stated class of direct appeals. For he is simply contending that, if the remedial statute or statutes (under which the Collector asserts that prescription has been suspended or interrupted) are held to be applicable, then those statutes are violative of the constitutional prescription which has been pleaded as a bar to the proceeding.

(2) Ever since our 1952 decision in State Farm Mut. Automobile Ins. Co. v. Ott, 221 La. 1061, 61 So. 2d 872, it has been the firmly established jurisprudence that the constitutional provision vesting this Court with jurisdiction of direct appeals, in all cases in which the constitutionality or legality of a tax is in contest, is restricted to those matters in which the validity of the statute or ordinance imposing the tax is questioned.

For the reasons assigned, it is ordered that this appeal be transferred to the Court of Appeal, Second Circuit, pursuant to the provisions of Article 2162, Code of Civil Procedure, the record to be filed in that Court by appellant within 30 days from the date on which this decree shall become final, otherwise, the appeal shall stand dismissed.

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(c) Opinion and decree rendered April 25, 1966, rehearing denied May 30, 1966 (writ granted June 30, 1966), of the Court of Appeal of Louisiana, Second Circuit, affirming the judgment of the District Court sustaining petitioner's plea of prescription and dismissing respondent's suit. 186 So. 2d 652.

Before HARDY, AYRES and BOLIN, JJ.

BOLIN, Judge.

The Louisiana Collector of Revenue has appealed from the upholding of an exception filed in the District Court to the effect that income taxes based on an assessment, contested by the taxpayer but upheld by the Board of Tax Appeals, prescribed in three years from December 31 of the year in which the taxes became due.

This case was first appealed directly to the Supreme Court of Louisiana but was remanded to this court for further proceedings. (248 La. 571, 180 So. 2d 708, 1965). In the judgment of the Supreme Court ordering the remand the reasons for such action were set forth as follows:

> "Ever since our 1952 decision in State Farm Mut. Automobile Ins. Co. v. Ott, 221 La. 1061, 61 So. 2d 872, it has been the firmly established jurisprudence that the constitutional provision vesting this Court with jurisdiction of direct appeals, in all cases in which the constitutionality or legality of a tax is in contest, is restricted to those matters in which the validity of the statute or ordinance imposing the tax is questioned."

APPENDIX B

Clearly this was not the issue in the instant case as there was no question of the validity or legality of the tax.

No evidence was presented on the plea of prescription. Only the following facts are pertinent to the present case. On June 9, 1949, Ben Beckham, Jr., was assessed by the Collector for the sum of $6,546.47, representing additional income taxes for the year 1945 together with interest to the date of assessment.

Appellee timely filed a petition with the Board of Tax Appeals, in which he asked for a redetermination of the deficiency set forth by the Collector. The assessment was affirmed by the Board. No further action was taken by either party until some 15 years later.

On or about June 1, 1965 the Collector located a bank account belonging to appellee in the Pioneer Bank & Trust Company. The Collector immediately proceeded to distrain the said bank account under the provisions of Louisiana Revised Statutes 47:1569, 47:1570 and 47:1571.

The bank refused to honor the Collector's levy and a summary proceeding was filed against the bank as provided by Louisiana Revised Statutes 47:1574. The bank then deposited the amount of the State's claim in the registry of the District Court and was dismissed from the proceeding. Appellee was made a party defendant and the present litigation is between the Collector and the taxpayer, Ben Beckham, Jr.

Appellee filed both an exception of prescription and an answer. The exception was based on the fact the petition showed on its face the taxes sought to be collected are income taxes for

the year 1945 and are therefore prescribed under Article 19, Section 19, of the Louisiana Constitution of 1921, as amended in 1938, which provides:

> "* * * all taxes and licenses, other than real property taxes, shall prescribe in three years from the 31st day of December in the year in which such taxes or licenses are due."

The issue here presented appears to be res nova in Louisiana and involves a determination of the meaning and validity of Louisiana Revised Statutes 47:1579, 47:1580 and 47:1581, when viewed in the light of the Constitutional provisions set forth above, and Section 16, Article 19, 1921 Constitution, which provides as follows:

> "Prescription shall not run against the State in any civil matters, unless otherwise provided in this Constitution or expressly by law."

The pertinent statutes of Title 47 cited supra provide as follows:

> "47:1579. There shall be no prescription running against any state tax, license, excise, interest, penalty or other charge levied under this Sub-title, except that ordained in the Constitution of Louisiana.
>
> "47:1580. The prescription running against any state tax, license, excise, interest, penalty or other charge shall be interrupted by:
>
> "(1) The collector's action in assessing any such amounts in the manner provided by law;

APPENDIX B

"(2) The filing of a summary proceeding in court;

"(3) The filing of any pleadings, either by the collector or by a taxpayer, with the board of tax appeals or any state or federal court; * * *

* *

"47:1581. Any tax, penalty, interest or other charges duly assessed under this Subtitle, being the equivalent of a judgment, shall not be subject to the running of any prescription other than such prescription as would run against a judgment in favor of the State of Louisiana in accordance with the Constitution and laws of this state; and the recordation of such assessment shall have the same effect as the recordation of a judgment."

(1) Since the case of Henwood v. Collector of Revenue (La. App., 1 Cir., 1951) 51 So. 2d 105 (writs denied), it is clear the Legislature has authority to provide for an interruption of a constitutional prescription, not only by the filing of a suit in court but also by the method prescribed under Act 21 of 1934, that is, by the mailing of a notice of an alleged tax deficiency.

(2 - 4) Nevertheless, once this "interruption", by whatever means, is concluded the prescription provided for in the Louisiana Constitution commences to run anew. While it may be that Title 47, Section 1581 of the Louisiana Statutes dignifies an "assessment" by equating it with a "judgment", nevertheless the assessment retains its identity as a tax claim. Therefore, under the quoted portion of Louisiana

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Constitution Art. 19, Sec. 19, the tax prescribed in three years from the date of the decision of the Board of Tax Appeals in 1950.

For the reasons assigned the judgment appealed from is affirmed.

Affirmed.

(d) Opinion and decree of the Supreme Court of Louisiana rendered February 20, 1967, rehearing denied March 27, 1967, annulling and reversing the judgments of the District Court and the Court of Appeal, overruling petitioner's exception of prescription and remanding to the District Court for further proceedings consistent with the views therein expressed. 250 La. 446, 196 So. 2d 270.

McCALEB, Justice.

On June 9, 1949 the Collector of Revenue assessed Ben Beckham, Jr. for a deficiency in income taxes for the year 1945 amounting to $6,546.47, together with interest pursuant to the provisions of R.S. 47:1562 (Act 21 of 1934, Sec. 83(a), as amended). Beckham protested and appealed to the Board of Tax Appeals, State of Louisiana, requesting a redetermination of the deficiency set forth by the Collector. On February 14, 1950 the Board of Tax Appeals rendered its decision affirming the assessment and no appeal to the courts was thereafter taken by Beckham. The amount of taxes found due by the Board of Tax Appeals was $5,513.01 with interest thereon at the rate of 6% per annum from May 15, 1946 until paid.

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Thereafter the Collector sought to execute on the assessment[1/] without success and finally, during 1965, it was ascertained that Beckham had funds on deposit with Pioneer Bank & Trust Company in the Parish of Caddo. On June 1, 1965, the Collector brought this summary proceeding, as provided by R.S. 47:1574, against Pioneer Bank & Trust Company to distrain the bank account of Beckham, conformably with R.S. 47:1569, 47:1570 and 47:1571. It is alleged that the Collector, by final decision of the Board of Tax Appeals, has an exigible "judgment" against Beckham in the sum of $10,762.87 ($5,513.01 together with interest thereon amounting to $3,803.98; collection and court costs of $300 and attorney's fees of $1,145.88, provided by R.S. 47:1512) which is unpaid and that Beckham has on deposit with Pioneer Bank & Trust Company an amount in excess of this sum. The Pioneer Bank answered, disclaiming interest in the account, deposited the amount to the Collector's claim into the Registry of the District Court, requested that Beckham be made a party to the proceedings and prayed

---

1/ Being unable to find any assets belonging to Beckham in Louisiana, the Collector filed suit against him in the Circuit Court of Jefferson County, Alabama, Equity Division, to recover the amount of the assessment, interest and attorney's fees. No judgment was secured in that jurisdiction.

APPENDIX B

that it be hence dismissed. Conformably with its plea the bank was dismissed. Beckham then appeared and filed an exception of prescription, a plea of unconstitutionality of R.S. 47:1401 et seq. and an answer resisting the rule of the Collector.

In his plea of prescription Beckham contended that the levy and distraint, being based on a "decision" of the Board of Tax Appeals of the State during the year 1950, or more than fifteen years prior to the institution of the rule for the collection of income taxes, cannot be maintained because the taxes on which the assessment is predicated are prescribed by Article 19, Section 19 of the Constitution of 1921, as amended by Act 35 of 1938, adopted November 8, 1938. This amendment provides: "* * * that all taxes and licenses, other than real property taxes, shall prescribe in three years from the 31st day of December in the year in which such taxes or licenses are due."

Following a trial on the rule nisi the exception of prescription was maintained, the proceeding dismissed and the Clerk of Court was ordered to pay Beckham the sum deposited in the Registry of the Court. The Collector then appealed here from the adverse decision and, finding that this Court was without jurisdiction, we ordered the case transferred to the Court of Appeal, Second Circuit. See 248 La. 571, 180 So. 2d 708. After a hearing, the Court of Appeal affirmed the district court's judgment. See 186 So. 2d 652. That court was of the opinion that, whereas the running of the three-year prescription provided for by Section 19 of Article 19 of the Constitution had been interrupted by the Collector's action in assessing a deficiency in income taxes, as specified in R.S. 47:1580 (1)

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and also by the filing of pleadings with the Board of Tax Appeals, as provided in R.S. 47: 1580(3), such prescription began to run anew at the time the interruption "* * * is concluded * * *". And it was resolved "Therefore, under the quoted portion of Louisiana Constitution Art. 19, Sec. 19, the tax prescribed in three years from the date of the decision of the Board of Tax Appeals in 1950."

The application of the Collector for certiorari was granted and the matter has been argued and submitted for our determination.

The Court of Appeal was unquestionaly correct in holding that the course of the three-year constitutional prescription had been interrupted in this case. R.S. 47:1580 provides that the prescription running against any state tax, license, excise, interest, penalty or other charge shall be interrupted by:

> "(1) The collector's action in assessing any such amounts in the manner provided by law;
>
> "(2) The filing of a summary proceeding in court;
>
> "(3) The filing of any pleadings, either by the collector or by a taxpayer, with the board of tax appeals or any state or federal court; and
>
> "(4) The filing of a false or fraudulent return * * * ".

(1) Thus, the Collector's action in assessing a deficiency in income taxes against Beckham for the year 1945 interrupted the running of the constitutional prescription, as admittedly, three

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years had not run at the time such assessment was made. Likewise, the prescription remained interrupted when Beckham appealed to the Board of Tax Appeals and it was still interrupted after the Board of Tax Appeals sustained the Collector's assessment for a deficiency, albeit for a lesser amount of taxes than that assessed by the Collector.

However, we entertain grave doubt as to the ultimate conclusion of the Court of Appeal that the constitutional prescription, once interrupted, began to run over again in 1950 from the date of the decisions of the Board of Tax Appeals. We know of no law or jurisprudence warranting the deduction that, when the running of prescription is interrupted by the commencement of a suit or other proceeding in which a monetary claim is reduced to judgment or rendered subject to execution, the same prescription starts running anew as soon as the proceedings are concluded by the rendition of a judgment or a final assessment. On the contrary, Article 3518 and 3519 of the Civil Code, which treat of the legal interruption of prescription by suit, make it clear that, once prescription has been interrupted, it may never run again save and except in case the claimant has abandoned or discontinued his demand, in which event the interruption is considered as having never happened (see Article 3519 C.C.). Article 3519 does provide for another prescription, that of five years for lack of prosecution, which accrues only in the event the claimant has allowed such time to elapse without having taken any steps in the prosecution of the claim -- for, here again, he is considered as having abandoned it. There is, of course, another prescription applying to money judgments. These judgments prescribe in ten years under Article 3547 of the Civil Code

unless revived before that time pursuant to the procedure set forth in the Article.

R.S. 47:1581 declares:

> "Any tax, penalty, interest, or other charges duly assessed under this Sub-title, being the equivalent of a judgment, shall not be subject to the running of any prescription other than such prescription as would run against a judgment in favor of the State of Louisiana in accordance with the Constitution and laws of this state; and the recordation of such assessment shall have the same effect as the recordation of a judgment."

The Court of Appeal rightly recognized in its opinion that this statute equates an assessment by the Collector to a judgment. However, it is evident that the court declined to give effect to the legislative equation for it stated that, while the statute dignifies an "assessment" as the equivalent of a judgment, "* * * nevertheless the assessment retains its identity as a tax claim."

By failure to perceive that there is a factual and legal difference between a mere tax claim and a final assessment, we believe the Court of Appeal fell into error. A tax claim may be assimilated to other monied demands for purposes of this discussion, except that it is collectible by methods other than suit. Indeed, R.S. 47:1561 vests in the Collector three alternative remedies for the collection of taxes, i.e., assessment and distraint, summary court proceeding or ordinary suit (See Collector of Revenue v. Olvey, 238 La. 980, 117 So. 2d 563, and Collector of Revenue v. Frost, 240 La. 1067, 127 So. 2d 151), and, whenever one of these remedies is exerted to final

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conclusion and the tax assessment or judgment, as the case may be, becomes executory by distraint or otherwise, the status of the tax claim is thus transformed into an assessment or a judgment enforceable by seizure, garnishment or distraint. It therefore necessarily follows that the Constitutional prescription, applicable only to tax claims which have not been asserted during a three year period, can no longer be invoked, forasmuch as the running of that prescription has been forever tolled by the action of the Collector in having timely reduced the claim to final assessment or judgment.2/

2/ The opposite view harbored by the lower courts would unquestionably lead to unseemly consequences. For the holding that the constitutional prescription starts anew from the date of the final assessement, or the date of the Board of Tax Appeals decision or, in like manner, from the court judgment, might well subject the State to the loss of its revenue by prescription notwithstanding the diligence of its Collector in establishing the claims timely and pursuing them to finality. The ruling below, if allowed to stand, would thus enable the judgment proof tax debtor to be relieved of his debt within three years and perhaps tempt unscrupulous ones to hide their assets, move them out of the State and, after three years, bring them back free from the fixed tax liability.

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(2) The prescription provided in Section 19 of Article 19 of the Constitution by the amendment adopted in 1938, was never designed as an interdiction to the collection of tax judgments or assessments timely obtained. The sole purposes of the amendment was to deter the practice of bringing suits on stale tax claims. State v. Alden Mills, 202 La. 416, 12 So. 2d 204.3/

3/ There, the court said "The cause which induced the Legislature to enact the joint resolution, Act 35 of 1938, proposing to amend the Constitution so as to put an end to the bringing of suits on stale claims for back taxes alleged to be more than three years past due, was the disclosure in the case of State v. Standard Oil Co., 188 La. 978, loc. cit. 1034-1037, 178 So. 601, loc. cit. 619, 620, that * * * the prescription by which, under Act 148 of 1906, suits to collect delinquent license taxes were barred after the lapse of three years, * * * became inapplicable to the severance tax imposed upon natural resources under the authority of the Constitution of 1921".

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(3, 4) Once the assessment of taxes has been made and has become final, either by reason of the tax debtor's failure to appeal to the Board of Tax Appeals and thereafter to the courts, or, as here, by his failure to appeal to the courts from an adverse decision of the Board of Tax Appeals, the "assessment" of the Collector or the "judgment" of the Board of Tax Appeals or the court, in the event of appeal, the tax assessed is no longer a claim but an established liability which may be collected either by distraint or through judicial process as provided by R.S. 47:1574. Being a final assessment or a judgment, as the case may be, the constitutional prescription provided in Section 19 of Article 19 is irrelevant and were any prescription at all applicable it would be the one which applies to judgments. But the prescription applicable to judgments or final assessments cannot be invoked against the State. For Section 16 of Article 19 of the Constitution declares: "Prescription shall not run against the State in any civil matter, unless otherwise provided in this Constitution or expressly by law."

And R.S. 47:1570 states "There shall be no prescription running against any state tax, license, excise, interest, penalty or other charges levied under this Sub-title, except that ordained in the Constitution of Louisiana."

(5) Since the only prescription applicable to the collection of excise and license taxes provided for in the Constitution is the three-year prescription, which has been effectually interrupted in the case at bar, the plea of Beckham is not well founded and should have been overruled.

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For the reasons assigned, the judgments of the district court and the Court of Appeal are annulled and reversed; the exception of prescription is overruled and the case is remanded to the district court for further proceedings consistent with the views herein expressed.

(e) Judgment of First District Court dated May 29, 1967, in favor of respondent on the merits and dismissing petitioner's plea of unconstitutionality.

COLLECTOR OR REVENUE
Plaintiff

NO. 169,401

VS.

FIRST DISTRICT COURT

PIONEER BANK & TRUST COMPANY, ET AL.
Defendants

CADDO PARISH, LA.

JUDGMENT

This case was submitted on a plea of unconstitutionality filed by Ben Beckham, Jr. and was argued to the court on May 29, 1967.

Present in court: Emmett E. Batson representing the Collector or Revenue and J.C. Smith representing Ben Beckham, Jr.

The Court having heard the argument of counsel and considered the pleadings and evidence, and finding the law and evidence to be in favor thereof for reasons orally assigned,

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IT IS ORDERED, ADJUDGED AND DECREED that the plea of unconstitutionality filed by Ben Beckham, Jr. be and the same is hereby dismissed and that there be judgment herein in favor of the plaintiff Collector of Revenue.

This case having been submitted on the merits, by agreement,

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Clerk of Court pay to the Collector of Revenue the sum of $10,762.87 plus legal interest from the date of judicial demand out of the funds deposited into the registry of this court by Pioneer Bank & Trust Company on June 18, 1965.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that all costs of these proceedings be paid out of the funds on deposit in the registry of the court and that any funds remaining after the payment to the Collector of Revenue and the payment of costs be paid to Ben Beckham, Jr.

JUDGMENT READ, RENDERED AND SIGNED in open court May 29, 1967.

/s/ John A. Dixon, Jr.
DISTRICT JUDGE

(f) Opinion and decree rendered October 30, 1967, rehearing denied November 28, 1967 (writ refused February 5, 1968), of the Court of Appeal, Second Circuit, affirming the judgment of the District Court. 204 So. 2d 133.

BEFORE GLADNEY, BOLIN and BARHAM, JJ.

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BARHAM, Judge.

This case was previously appealed to the Louisiana Supreme Court which, finding itself without jurisdiction, transferred that appeal to this Court, 248 La. 571, 180 So. 2d 708. This Court then affirmed the district court's judgment sustaining a plea of prescription, 186 So. 2d 652. Writs were granted by the Supreme Court and after a hearing that Court annulled and reversed the judgments of the district court and of this Court and remanded the case to the district Court for further proceedings, 250 La. 446, 196 So. 2d 270.

The defendant had originally filed, in addition to the plea of prescription, a plea of unconstitutionality directed at LSA-R.S. 47:1401, et seq., contending that a board which is an agency of the executive department of the State is without constitutional power or authority to render a final judgment against him since such authority would be in contravention of Article 7 of the Louisiana Constitution of 1921. The prescription which was relied upon by plaintiff is provided by Article 19, Section 19 of the Louisiana Constitution of 1921, as amended in 1938.

The Supreme Court in its opinion cited LSA-R.S. 47:1581, which provides:

"Any tax, penalty, interest, or other charges duly assessed under this Sub-title, being the equivalent of a judgment, shall not be subject to the running of any prescription other than such prescription as would run against a judgment in favor of the State of Louisiana in accordance with the Constitution

and laws of this state; and the recordation of such assessment shall have the same effect as the recordation of a judgment."

The Court states that under LSA-R.S. 47:1561:

"* * *whenever one of these remedies is exerted to final conclusion and the tax assessment or judgment, as the case may be, becomes executory by distraint or otherwise, the status of the tax claim is thus transformed into an assessment or a judgment enforceable by seizure, garnishment or distraint."

The Supreme Court finally concludes:

"Once an assessment of taxes has been made and has become final, either by reason of the tax debtor's failure to appeal to the Board of Tax Appeals and thereafter to the courts, or, as here, by his failure to appeal to the courts from an adverse decision of the Board of Tax Appeals, the 'assessment' of the Collector or the 'judgment' of the Board of Tax Appeals or the court, in the event of appeal, the tax assessed is no longer a claim but an established liability which may be collected either by distraint or through judicial process as provided by R.S. 47:1574. Being a final assessment or a judgment, as the case may be, the constitutional prescription provided in Section 19 of Article 19 is irrelevant and were any prescription at all applicable it would be the one which applies to judgments. But the prescription applicable to judgments or final assessments cannot be invoked against the State. For Section 16 of Article 19 of the Constitution declares: 'Prescription shall not run against the State in any

civil matter, unless otherwise provided in this Constitution or expressly by law.' And R.S. 47:1579 states 'There shall be no prescription running against any state tax, license, excise, interest, penalty or other charges levied under this Sub-title, except that ordained in the Constitution of Louisiana.'

"Since the only prescription applicable to the collection of excise and license taxes provided for in the Constitution is the three-year prescription, which has been effectually interrupted in the case at bar, the plea of Beckham is not well founded and should have been overruled."

The appellant herein, upon remand to the district court by the Supreme Court, filed an amended plea of unconstitutionality which urged, in addition to the original plea, that LSA-R.S. 47:1580 and LSA-R.S. 47:1581 were unconstitutional in providing interruption of prescription by the action of the Collector of Revenue in the assessment of a tax or by a decision of the Board of Tax Appeals. Appellant contends that neither the Collector nor the Board of Tax Appeals, as legislative creations serving the executive department of the State of Louisiana, can render a 'judgment', which is a judicial function.

It is the contention of the appellant, and technically the contention is correct, that the Supreme Court did not declare the above statutes constitutional in its previous decision and that this Court must, therefore, pass upon their constitutionality.

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(1, 2) The Supreme Court in its opinion, however, takes notice of the original plea of unconstitutionality and finally rests its decision upon a study and comparison of the constitutional provisions and the statute provisions and does equate a final "assessment" to a "judgment", to-wit:

> "Being a final assessment or a judgment as the case may be, the constitutional prescription provided in Section 19 of Article 19 is irrelevant and were any prescription at all applicable it would be the one which applies to judgments." (Emphasis supplied)

Impliedly, if not in fact, the Supreme Court has held that an executive arm of the government, i.e., the Collector of Revenue or the Board of Tax Appeals, may render a "judgment"..

The Supreme Court found good reason for supporting such a conclusion in footnote No. 2 wherein it states that any contrary holding would encourage fraud, relieve tax debtors of their obligation, and in general create "unseemly consequences."

The judgment of the district court is affirmed at appellant's cost.

(g) Decree of Supreme Court refusing petitioner's application for certiorari or writ of review to the Court of Appeal, Second Circuit, rendered February 5, 1968:

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COLLECTOR OF REVENUE
OF STATE OF LOUISIANA

VS.

PIONEER BANK & TRUST
COMPANY, BEN BECKHAM,
JR.

No. 49019

Supreme Court of Louisiana.
Feb. 5, 1968

In re: Ben Beckham, Jr., applying for certiorari, or writ of review to the Court of Appeal, Second Circuit, Parish of Caddo. 204 So. 2d. 133.

Writ refused. There is no error of law in the judgment of the Court of Appeal.

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Portions of Record Raising Constitutional Questions Below

(a) Supplemental and Amended Plea of Unconstitutionality (R-6, Vol. II) filed May 29, 1967.

COLLECTOR OF REVENUE, Plaintiff — NO. 169,401

VS. — FIRST DISTRICT COURT

PIONEER BANK & TRUST COMPANY, ET AL., Defendants — CADDO PARISH, LOUISIANA

SUPPLEMENTAL AND AMENDED PLEA OF UNCONSTITUTIONALITY

NOW INTO COURT, through undersigned counsel, comes BEN BECKHAM, JR., defendant herein, and with respect shows:

1.

That his original Plea of Unconstitutionality of Act 299 of 1942 (R.S. 47:1401, et seq.,) was predicated on the allegations relied on by the State of Louisiana that it held "a final judgment of the Board of Tax Appeals of the State of Louisiana," a certified copy of which was attached to its petition herein, and that said Board of Tax Appeals was an independent agency in the Executive Department of the State government and was without constitutional power or authority to render "a final judgment" against defendant, all

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as shown by said original plea, the allegations of which are reiterated.

2.

Defendant now shows that on February 20, 1967, the Supreme Court of the State of Louisiana reversed the judgments of the District Court and of the Court of Appeal, Second Circuit, and overruled defendant's plea of prescription under Article 19, Section 19 of the Constitution of the State of Louisiana, basing its decision, in part, on R.S. 47:1580 and R.S. 47:1581, providing that prescription against state taxes shall be interrupted by action of the Collector of Revenue in assessing the tax, or the filing of pleadings by the Collector or taxpayer with the Board of Tax Appeals, and that a tax, after being duly assessed, * * * "being the equivalent of a judgment, shall not be subject to the running of any prescription other than such prescription as would run against a judgment in favor of the State of Louisiana in accordance with the Constitution and laws of this state;" * * *

3.

The Collector of Revenue of the State of Louisiana is of the Executive Department and is without constitutional power or authority to make an assessment of taxes having the effect of a judgment in favor of the State of Louisiana, and the assessment here against defendant by the Collector of Revenue under said statutes is the exercise or attempted exercise of judicial power which is vested exclusively in the Courts of Louisiana, as established by Article 7 of the

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Louisiana Constitution of 1921, as amended, and such power is not vested in the Executive Department of the State government by Article 5 of the State Constitution, and any judicial power of government exercised or attempted under said statutes by the Executive Department or the Collector of Revenue would violate Article 2, Sections 1 and 2, of the State Constitution, said statutes and the attempted assessment thereunder, therefor, being unconstitutional.

WHEREFORE, appearer prays that this amended plea of unconstitutionality and his plea of unconstitutionality be sustained and that there be judgment herein in favor of appearer, Ben Beckham, Jr., and against plaintiff, rejecting the demands of plaintiff, at plaintiff's costs.

And for all orders necessary, general and equitable relief.

/s/ J.C. Smith
J.C. Smith
1314 Commercial National
Bank Building
Shreveport, Louisiana

Attorney for Appearer,
Ben Beckham, Jr.

I hereby certify that a copy of the above has been delivered to Mr. E.E. Batson, attorney for plaintiff, this 29th day of May, A.D., 1967.

/s/ J.C. Smith
Attorney for Ben Beckham,
Jr.

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(b) Petitioner's Petition for Rehearing in Court of Appeal, Second Circuit, State of Louisiana, filed November 10, 1967 (attached to Record, Vol. II).

NO. 10,887

COURT OF APPEAL

SECOND CIRCUIT

STATE OF LOUISIANA

* * * * *

COLLECTOR OF REVENUE OF STATE OF LOUISIANA,

Plaintiff-Appellee,

VS.

PIONEER BANK & TRUST COMPANY,

Defendant-Appellee,

BEN BECKHAM, JR.,

Defendant-Appellant

* * * * *

PETITION FOR REHEARING

NOW COMES BEN BECKHAM, JR., defendant-appellant, through undersigned counsel, and with respect shows that the decree of this

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Honorable Court rendered October 30, 1967, affirming the judgment of the District Court, is erroneous and contrary to law and is prejudicial to defendant, and that a rehearing should be granted herein for the following reasons:

1.

The Court is in error in equating a "final assessment" to a "judgment" in favor of the State of Louisiana, which becomes imprescriptible the same as a judgment in a civil matter in favor of the State of Louisiana.

2.

The Court is in error in holding that the Supreme Court did or could properly decree before issue was presented that an "assessment" by an Executive agency of the State government could constitutionally convert a claim by the State for unpaid income taxes to a judgment in favor of the State and thereby render ineffective the prescription against collection by the State of taxes as provided in Article 19, Section 19, of the State Constitution. The sole constitutional issue before the Supreme Court was the State's assertion that prescription was inapplicable because the State held "a decision by the Board of Tax Appeals." The State did not assert by pleading that an assessment, which is purely an administrative act of the Executive Department, had the effect of a judgment in favor of the State. The decree, therefore, goes beyond the issues presented and denies to petitioner the equal protection of laws and deprives him of property without due process of law, all in contravention of the Fourteenth Amendment to the

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Federal Constitution.

3.

Article 19, Section 19, of the Louisiana Constitution providing that all taxes and licenses other than real property taxes prescribe in three years from the 31st day of December in the year in which such taxes or licenses are due, was adopted by the people as an amendment to the Constitution of the State of Louisiana, which Constitution establishes the functions to be performed by the three departments of government, judicial, legislative and executive, none of which can be performed by either of the other, and any statute, particularly LSA-R.S. 47:1401, et seq., and LSA-R.S. 47:1581, which purport to authorize the Department of Revenue and the Board of Tax Appeals, both being agencies of the Executive Department, to exercise judicial functions and in effect decree that an "assessment" or a "decision" of the Board of Tax Appeals is a "judgment" contravenes Article 4, Section 4, of the Federal Constitution, providing that the United States shall guarantee to every State in this Union a Republican form of Government. To permit the Executive Department to render judgments which would become imprescriptible would destroy the constitutional power and authority of the courts and would vest in the Executive Department dictatorial and arbitrary powers contrary to the State Constitution. Article 19, Section 19, of the State Constitution is a limitation imposed by the citizens of the State upon the right of the Executive Department to collect income taxes where action, as here, was not taken by the State for over fifteen years.

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WHEREFORE, petitioner prays that this application for rehearing be granted and that upon such rehearing, the decree above referred to be recalled and held for naught, and that there be judgment herein in favor of petitioner rejecting the demands of plaintiff.

And for all orders necessary, general and equitable relief.

/s/ J. C. Smith
J. C. Smith
1314 Commercial National Bank Building, Shreveport, Louisiana

Attorney for Ben Beckham, Jr.,
Defendant-Appellant

I hereby certify that a copy of the foregoing petition for rehearing was this day mailed to Mr. Emmett E. Batson, attorney for plaintiff-appellee, Room 403, Capitol Annex Building, Post Office Box 201, Baton Rouge, Louisiana 70821, by regular United States mail, proper postage affixed.

Shreveport, Louisiana, this 10th day of November, A.D., 1967.

/s/ J. C. Smith
J. C. Smith

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(c) Excerpts from Petitioner's Application to Supreme Court of Louisiana for Writ of Review to Court of Appeal, Second Circuit, State of Louisiana, under "The Issues", "Question of Law Involved", and "Errors of Court of Appeal".

THE ISSUES

1.

Whether the Court impliedly or in fact overruled applicant's Amended Plea of Unconstitutionality, deprived him of due process or equal protection of law in contravention to Section 1 of the Fourteenth Amendment to the Federal Constitution.

2.

Whether the Legislature can by statute constitutionally declare an administrative act of the Collector of Revenue (an officer in the Executive Department of the State government) in assessing a tax converts the assessment into a judgment (which can only be rendered by a court), and thereby frustrate and render inoperative the prescription imposed upon the State against collection of taxes by Article 19, Section 19, of the Constitution of the State of Louisiana.

3.

Whether an "assessment" by the Collector of Revenue or a "decision" of the Board of Tax Appeals contravenes Article 4, Section 4, of the Federal Constitution providing that the United States shall guarantee to every state in this

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Union a republican form of government.

4.

Whether there is any prescription against collection by the State of all taxes (other than real property taxes) where the Collector of Revenue makes an "assessment" within three years from the 31st day of December in the year in which such taxes become due.

QUESTION OF LAW INVOLVED

The prescription established by Louisiana Constitution Article 19, Section 19 (as amended by Act 1938, No. 35, adopted November 8, 1938), clearly bars the State from collecting from applicant in 1965 income taxes for the year 1945, which became due in 1946, unless the Legislature has empowered an executive officer of the State to make an "assessment" of taxes having the full force and effect of a "judgment".

ERRORS OF COURT OF APPEAL

The Court of Appeal in its final decision committed the following errors of law:

1.

In equating an assessment to a judgment in favor of the State, against which prescription of three years established by the Constitution barring collection of taxes does not apply.

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2.

In denying to applicant a hearing on his Amended Plea of Unconstitutionality and in holding that the statute attacked as unconstitutional was declared valid prior to filing the Amended Plea.

DENIED